SUPREME COURT, U. S.
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In The

Supreme Court of the United States

October Term, 1974

No. 74-923

MICHAEL FERRARA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To: The Honorable, The Chief Justice of the United States, and the Associate Justices of the United States Supreme Court.

The petitioner, Michael Ferrara, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on November 27, 1974.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, is part of the judgment and order; it appears in the Appendix hereto. No opinion was rendered by the District Court for the District of New Jersey.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on November 27, 1974 and is set forth in the Appendix hereto.

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

An extension of time within which to file this petition was sought by petitioner pursuant to an application dated December 23, 1974. On December 30, 1974, this Court ordered that the time for filing a petition for writ of certiorari in this case be extended to January 26, 1975.

QUESTION PRESENTED

Whether the conflict among the Circuits over the test for determining whether sufficient independent evidence of a defendant's participation in a conspiracy exists so as to make admissible against that defendant the hearsay declarations of co-conspirators, now requires the Supreme Court to clarify authoritatively this important area of the criminal law.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 18, Sections 371, 549 and 659.

STATEMENT OF CASE

Petitioner and five other persons were charged in August, 1973, in a three count indictment. Count one alleged a conspiracy to steal goods moving in interstate and foreign commerce and to remove goods unlawfully from Customs' custody (18 U.S.C. §371); count two charged unlawful possession of goods stolen while moving in interstate and foreign commerce (18 U.S.C. §659); count three charged unlawful removal of goods from Customs' control (18 U.S.C. §549).

Unindicted co-conspirator Louis Gonzalez was the principal witness for the government. His testimony outlined a series of meetings in which Gonzalez and several co-defendants planned to steal a shipment of television sets from the Port Elizabeth pier in New Jersey. The theft was later executed during normal business hours at the pier by one of the co-conspirators driving to the pier and carrying away the goods. Gonzalez gave no direct testimony of participation by petitioner in any of the conspiratorial meetings or acts. He did, however, damagingly testify, over defense objection, as to hearsay declarations by petitioner's co-conspirators about petitioner's participation in the scheme.

Aside from Gonzalez's recitation of co-conspirators' hearsay declarations concerning petitioner, the only other evidence as to petitioner's participation in the conspiracy was circumstantial.

Essentially, this testimony related to allegedly improper processing by petitioner — the only one of the defendants employed at the pier — of two papers presented by the co-conspirator who actually drove the truck that carried away the goods in question. The government contention was that petitioner's processing of these papers permitted the conspirators to remove the goods from the pier and that this evidence constituted sufficient independent evidence of petitioner's participation in the scheme so as to make admissible against petitioner the hearsay declarations of co-conspirators.

In regard to one of these two papers processed by petitioner, the evidence was undisputed that four other pier employees in addition to petitioner processed this same paper and thereby permitted the driver to remove the goods. At no time did the government charge any of these four persons as participants in the scheme. As to the processing of the second paper, the evidence here was conflicting and ambiguous. During trial, the government acknowledged to the court that its evidence regarding petitioner was "not as strong" (A151)* as that against a co-defendant who was acquitted by the jury.

In charging the jury, the trial court instructed that it could find petitioner guilty of the acts charged in the two substantive counts if it found him guilty of the conspiracy charge and if it found that the acts charged in the two substantive counts were committed in furtherance of the conspiracy. Convicted on all three counts, petitioner was sentenced to concurrent prison terms of two years on each count.

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* References marked "A" are to petitioner's appendix filed in the Court of Appeals

REASONS FOR GRANTING THE WRIT

In the Court of Appeals, petitioner argued that there was insufficient evidence of petitioner's participation in the conspiracy to render admissible against him the hearsay declarations by co-conspirators to which petitioner objected. Petitioner argued that the test for determining the sufficiency of the proof *aliunde* was that enunciated by the United States Court of Appeals in *Geaney v. United States*, 417 F.2d 1116 (2nd Cir. 1969), which was the following:

> "The judge must determine, when all the evidence is in, whether in his view the prosecution has proved participation in the conspiracy, by the defendant against whom hearsay evidence is offered, by a *fair preponderance of the evidence independent of the hearsay utterances.* If it has, the utterances go to the jury for them to consider along with the other evidence in determining whether they are convinced beyond a reasonable doubt. If it has not, the judge must instruct the jury to disregard the hearsay . . ." (*Id.* at 1120; emphasis added).

Rejecting the Second Circuit's "fair preponderance" test, the Third Circuit, in affirming the petitioner's conviction, reaffirmed an earlier holding in *United States v. DeLazo*, 497 F.2d 1168 (3rd Cir. 1974) that "only slight evidence" of a defendant's participation in a conspiracy is necessary in order to make admissible against him the hearsay declarations of co-conspirators (Appendix, 6a).

Clearly, this "slight evidence" test employed by the Third Circuit conflicts with the "fair preponderance" test used by the Second Circuit in assessing whether the proof *aliunde* of conspiratorial participation renders admissible hearsay declarations of co-conspirators. Petitioner respectfully submits that if the Second Circuit test had been employed in the instant case, the proof *aliunde* would have been deemed insufficient to make admissible against petitioner the co-conspirators' hearsay declarations, and accordingly, his conviction would have been reversed.

This sharp conflict in the application of the basic federal conspiracy law — 18 U.S.C. §371 — justifies this Court's granting the petition for writ of certiorari.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the judgment and order of the Court of Appeals for the Third Circuit.

Respectfully submitted,

s/ Frederick P. Hafetz

GOLDMAN & HAFETZ
Attorneys for Petitioner

January 23, 1975

APPENDIX

STATUTES IN QUESTION

§371. Conspiracy to Commit Offense or to Defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

§549. Removing Goods From Customs' Custody; Breaking Seals.

Whoever, without authority, affixes or attaches a customs' seal, fastening, or mark, or any seal, fastening, or mark purporting to be a customs' seal, fastening, or mark to any vessel, vehicle, warehouse, or package; or

Whoever, without authority, willfully removes, breaks, injures, or defaces any customs' seal or other fastening or mark placed upon any vessel, vehicle, warehouse, or package containing merchandise or baggage in bond or in customs' custody; or

Statutes In Question

Whoever, maliciously enters any bonded warehouse or any vessel or vehicle laden with or containing bonded merchandise with intent unlawfully to remove therefrom any merchandise or baggage therein, or unlawfully removes any merchandise or baggage in such vessel, vehicle, or bonded warehouse or otherwise in customs' custody or control; or

Whoever receives or transports any merchandise or baggage unlawfully removed from any such vessel, vehicle, or warehouse, knowing the same to have been unlawfully removed —

Shall be fined not more than $5,000 or imprisoned not more than two years, or both.

§659. Interstate or Foreign Baggage, Express or Freight; State Prosecutions.

Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any railroad car, wagon, motortruck, or other vehicle, or from any station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express; or

Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen; or

Statutes In Question

Whoever embezzles, steals, or unlawfully takes, carries away, or by fraud or deception obtains with intent to convert to his own use any baggage which shall have come into the possession of any common carrier for transportation in interstate or foreign commerce or breaks into, steals, takes, carries away, or conceals any of the contents of such baggage, or buys, receives, or has in his possession any such baggage or any article therefrom of whatever nature, knowing the same to have been embezzled or stolen; or

Whoever embezzles, steals, or unlawfully takes by any fraudulent device, scheme, or game, from any railroad car, bus, vehicle, steamboat, vessel, or aircraft operated by any common carrier moving in interstate or foreign commerce or from any passenger thereon any money, baggage, goods, or chattels, or whoever buys, receives, or has in his possession any such money, baggage, goods, or chattels, knowing the same to have been embezzled or stolen —

Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods or chattels does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

The offense shall be deemed to have been committed not only in the district where the violation first occurred, but also in any district in which the defendant may have taken or been in possession of the said money, baggage, goods, or chattels.

Statutes In Question

The carrying or transporting of any such money, freight, express, baggage, goods, or chattels in interstate or foreign commerce, knowing the same to have been stolen, shall constitute a separate offense and subject the offender to the penalties under this section for unlawful taking, and the offense shall be deemed to have been committed in any district into which such money, freight, express, baggage, goods, or chattels shall have been removed or into which the same shall have been brought by such offender.

To establish the interstate or foreign commerce character of any shipment in any prosecution under this section the waybill or other shipping document of such shipment shall be prima facie evidence of the place from which and to which such shipment was made.

A judgment of conviction or acquittal on the merits under the laws of any State shall be a bar to any prosecution under this section for the same act or acts.

JUDGMENT AND ORDER OF COURT BELOW

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 74-1314

UNITED STATES OF AMERICA

v.

ANTHONY DE FALCO, FRANK BUSCEMI, ALFRED SARACENO, MICHAEL WEINBERG, MICHAEL FERRARA, RICHARD SANDUCCI

Michael Ferrara, a/k/a "Mickie,"

Appellant

(D.C. Crim. No. 521-73)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued November 14, 1974

Before VAN DUSEN, HUNTER and GARTH,
Circuit Judges

Frederick P. Hafetz, Esq., Goldman & Hafetz, New York City, N.Y.,
Attorneys for Appellant

Jonathan L. Goldstein, U.S. Attorney;
William T. Pizzi, Assistant U.S. Attorney;
Attorneys for Appellee

Judgment and Order

JUDGMENT ORDER

After considering the contentions raised by defendant-appellant (1) that there was insufficient evidence of such defendant's participation in the conspiracy, independent of the co-conspirators' hearsay declarations, to allow the aforesaid hearsay declarations into evidence;[1] (2) that there was insufficient evidence to allow the Government's case against such defendant to go to the jury; and (3) that the district court erred in admitting into evidence telephone company records of a call made from such defendant's residence,[2]

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1. We believe that there was sufficient independent evidence of the appellant's participation in the conspiracy for the objected to declarations to be admissible under the co-conspirator exception to the hearsay rule. See *United States v. DeLazo*, 497 F.2d 1168 (3d Cir. 1974) (only slight evidence required to connect the defendant with a conspiracy once the existence of the conspiracy is proven). In particular, the Government supplied abundant evidence that the theft was accomplished by the efforts of a number of people, working in concert to frustrate the complex system of cargo protection at the depot. The Government also demonstrated that the appellant, as a delivery clerk, was in a strategic position where he could have foiled, but instead facilitated, the scheme. This evidence provided the necessary foundation *aliunde* for application of the co-conspirator rule.

Also, the court finds that many of the declarations testified to by Gonzalez, including the phone call received at the Lamppost Lounge, were not hearsay under the principles adopted by this circuit in *United States v. Mesarosh*, 223 F.2d 449, 454-55 (3d Cir. 1955).

2. Telephone company records of the appellant were relevant to his association with the conspirators who had met at the Lamppost Lounge the night that the records indicated the appellant had called there. The records were properly admitted as business records. 28 U.S.C. §1732.

Judgment and Order

It is ADJUDGED AND ORDERED that the judgment of the district court be and hereby is affirmed.

BY THE COURT: -

Circuit Judge

Dated: November 27, 1974

Attest:

Chief Deputy Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-923

MICHAEL FERRARA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the court below used an erroneous standard to determine whether there was sufficient independent evidence of petitioner's participation in a conspiracy to allow admission of hearsay declarations.

Following a jury trial in the United States District Court for the District of New Jersey, petitioner and co-defendant Richard Sanducci were convicted of conspiracy to steal and unlawfully remove goods moving in interstate and foreign commerce, in violation of 18 U.S.C. 371; unlawful possession of goods stolen while moving in interstate and foreign commerce, in violation of 18 U.S.C. 659; and unlawful removal of goods from the control of customs officers, in violation of 18 U.S.C. 549. Petitioner was sentenced to concurrent terms of two years' imprisonment. The court of appeals affirmed (Pet. App. 5a-7a).

1. The indictment charged petitioner and five co-defendants[1] with conspiracy and substantive offenses arising out of the theft from a United States Customs area at Port Elizabeth, New Jersey, of a United States Lines container filled with color television sets. The evidence revealed that co-defendants Buscemi and Saraceno asked Louis Gonzalez[2] to drive a load of television sets from a diner in Port Elizabeth to a designated "drop" in return for $1,000 (7 Tr. 32-33). On the evening of February 22, 1972, Gonzalez accompanied Buscemi and Saraceno to the Lamppost Lounge to meet co-defendant Sanducci, who was to bring the television sets over to the diner (7 Tr. 34, 35-36). Sanducci told Gonzalez that he would use his own tractor to get the sets out of the United States Lines' container (7 Tr. 36).

During the meeting, one of the participants made a phone call (7 Tr. 37-38). Prior to the call, the participants said "they were going to call Mickey [sic] to verify with him to see if everything was all right for the next day." They told Gonzalez that "Mickey [sic] [was] the delivery clerk at the U. S. Lines" (7 Tr. 38-41). On the day of the theft, Sanducci arrived at the diner with the container in a trailer; Gonzalez drove the trailer to a garage in Staten Island, where the sets were unloaded and Gonzalez was paid (7 Tr. 46-58).

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[1]Prior to trial co-defendants Frank Buscemi, Alfred Saraceno, and Anthony DeFalco pleaded guilty to reduced charges. Co-defendant Michael Weinberg was acquitted on all counts.

[2]Gonzalez was an unindicted co-conspirator who agreed to testify as a government witness in exchange for a promise that he would not be prosecuted (7 Tr. 16). Transcript references are to volume and page of the trial transcript.

Other testimony showed that petitioner Ferrara was a clerk in the delivery area and that he was the only one named "Mickie" in that area (4 Tr. 116). Evidence showed that on the evening of February 22, 1972, a call was placed from petitioner's home phone to the Lamppost Lounge (8 Tr. 14, 25-45). The director of security for the terminal company testified that petitioner, who was a delivery clerk at the terminal, had processed the gate pass for the vehicle involved in the theft and had issued the tally for the stolen container, even though the driver had never gone to the United States Lines approval clerk for processing (3 Tr. 79-82, 90, 100, 109-110).[3]

At trial, Gonzalez narrated the conversations at the meeting among the conspirators. These included the discussion about the telephone call to "Mickey [sic]," the delivery clerk at the United States Lines (7 Tr. 38-41).[4]

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[3]Other evidence showed the significance of processing the documents without the clerk's authorization. This delivery order was a special transfer order issued internally by the United States Lines itself to permit delivery from port to port, here Port Elizabeth to Port Toronto. As such, the approval clerk never would have allowed the order to go through. All internal orders are sent by courier directly to the approval clerk, but here the transport trucking firm petitioner alleged was involved was not under contract with United States Lines for transporting from port to port; United States Lines does not ship inland to Toronto; the document involved was missing the date and weight required by law; the signature of the individual required to sign every such transfer order was forged (3 Tr. 92-93, 98-99; 7 Tr. 5-7).

[4]Before the testimony was received, the trial judge instructed the jury that it could not consider hearsay statements unless petitioner's own acts and statements had shown him to be a member of the conspiracy (7 Tr. 39-40). The trial judge repeated this limiting instruction in his final charge (12 Tr. 33).

The court of appeals held that the trial court was entitled to admit Gonzalez's testimony implicating petitioner. It stated that "there was sufficient independent evidence of [petitioner's] participation in the conspiracy for the objected to declarations to be admissible under the co-conspirator exception to the hearsay rule. See *United States* v. *DeLazo*, 497 F.2d 1168 (3d Cir. 1974) (only slight evidence required to connect the defendant with a conspiracy once the existence of the conspiracy is proven)" (Pet. App. 6a, n. 1).

2. Petitioner's sole contention is that the court of appeals employed a "slight evidence" standard in evaluating whether there was sufficient nonhearsay evidence connecting him to the conspiracy to allow the introduction of hearsay evidence against him under the co-conspirator exception to the hearsay rule, and that the "slight evidence" standard conflicts with the "fair preponderance" test enunciated in the leading case of *United States* v. *Geaney*, 417 F.2d 1116, 1120 (C.A. 2), certiorari denied *sub nom. Lynch* v. *United States*, 397 U.S. 1028.

Although the language used by the court of appeals in the instant case in explaining its result may not have been carefully chosen, there is no conflict in the standards used by the Second and the Third Circuits in evaluating the quantum of evidence necessary to sustain the admission against an accused of declarations of his alleged co-conspirators, once the existence of a conspiracy has been established by substantial nonhearsay evidence (see *United States* v. *Moraites*, 456 F.2d 435 (C.A. 3)). The Third Circuit has approved and followed the *Geaney* rule. See *United States* v. *Bey*, 437 F.2d 188 (C.A. 3); *United States* v. *DeCavalcante*, 440 F.2d 1264 (C.A. 3). Under this rule, as stated in *Geaney*, *Bey*, and *DeCavalcante*, a "fair preponderance" of the nonhearsay evidence must indicate that an accused is a member of the conspiracy before the district court may allow the jury to consider against him any hearsay declarations by co-conspirators.

By contrast, the "slight evidence" test is addressed to the quantum of evidence, including hearsay evidence, that is required to allow the case to go to the jury. All courts of appeals that have considered the matter have concluded that "slight evidence," in the context of an established conspiracy, may well suffice to demonstrate an accused's complicity beyond a reasonable doubt. *United States* v. *Marrapese*, 486 F.2d 918, 921 (C.A. 2); *United States* v. *DeLazo*, 497 F.2d 1168 (C.A. 3); *United States* v. *Maslanka*, 501 F.2d 208 (C.A. 5); *United States* v. *Mayes*, C.A. 6, No. 73-1988, decided February 25, 1975; *United States* v. *Braasch*, 505 F.2d 139, 148 (C.A. 7) (Mr. Justice Clark); *United States* v. *Hutchinson*, 488 F.2d 484, 490 (C.A. 8), certiorari denied *sub nom. Ennis* v. *United States*, 417 U.S. 915; *United States* v. *Nunez*, 483 F.2d 453, 460 (C.A. 9), certiorari denied, 414 U.S. 1076. On this test, too, there is no conflict.

Petitioner has not contended that the evidence of his complicity in the conspiracy, including hearsay evidence, was insufficient to allow the case to go to the jury; rather, he contends that the nonhearsay evidence of his involvement was inadequate to allow consideration of hearsay declarations. The "slight evidence" test was thus not properly relevant to the issue he raised, and it would have been more accurate for the court of appeals to have adverted to the "fair preponderance" test it had adopted in *Bey* and *DeCavalcante*. However, there is an apparent conflict among the circuits (although not between the Second and Third Circuits) concerning the rule expressed in *Geaney* and *Bey*. Several courts of appeals have held that the nonhearsay evidence of participation in the conspiracy must by itself be sufficient to allow a case to go to the jury before hearsay may be considered against a

defendant.[5] This presumably would mean that the "slight evidence" of involvement must be established entirely by nonhearsay evidence. But we submit that the Court need not resolve this verbal conflict in this case,[6] because under any formulation of the applicable standards the nonhearsay evidence linking petitioner to the conspiracy was adequate both to support the use of hearsay declarations by co-conspirators and to allow the case to go to the jury.

The nonhearsay evidence establishing membership in a conspiracy may be entirely circumstantial. *United States* v. *Cirillo*, 499 F. 2d 872, 883 (C.A. 2). Evidence in this case established that petitioner placed a call to the Lamppost Lounge on the night the other conspirators met there, that petitioner issued a tally for the container and a gate pass allowing the vehicle involved in the theft to leave the terminal (although he had no authority to do either), and that the documents allowing the vehicle to leave had been spuriously filled out and a required signature forged. This was ample circumstantial evidence that petitioner was operating in league with the other conspirators.

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[5]See *United States* v. *Johnson*, 467 F.2d 804, 807 (C.A. 1), certiorari denied, 410 U.S. 909; *United States* v. *Oliva*, 497 F.2d 130, 132-133 (C.A. 5); *Rizzo* v. *United States*, 304 F.2d 810, 826 (C.A. 8); *Carbo* v. *United States*, 314 F.2d 718, 737 (C.A. 9), certiorari denied, 377 U.S. 953 (but see *United States* v. *Spanos*, 462 F.2d 1012 (C.A. 9)). Cf. *United States* v. *Nixon*, No. 73-1766, decided July 24, 1974, slip op. 16, n. 14.

[6]It is by no means clear that the difference in standards articulated by the various circuits is actually likely to lead to different results on any given set of facts.

Moreover, the court of appeals held that "many of the declarations testified to by Gonzalez, including the phone call received at the Lamppost Lounge, were not hearsay * * * " (Pet. App 6a, n. 1). Petitioner has not controverted this conclusion. Perhaps the most important evidence against petitioner was the declaration by one conspirator that "they were going to call Mickey [sic]" (7 Tr. 38) to discuss plans for the theft, together with the evidence that petitioner (who is known as "Mickie") called the Lamppost Lounge that night. But this "verbal act" was not hearsay. "Explanatory words which accompany and give character to [a] transaction are not hearsay." McCormick, *Evidence* 589 (1972 ed.). See *United States* v. *Tramunti*, C.A. 2, No. 74-1550, decided March 7, 1975 (slip op. 2143); *United States* v. *Annunziato*, 293 F.2d 373, 377 (C.A. 2). Petitioner points to no evidence properly classified as hearsay that was used against him, and we are aware of none.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1975.